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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of the Cable Television)
Consumer Protection and Competition Act)
of 1992)

MM Docket No. 92-259

Broadcast Signal Carriage Issues

**PETITION FOR EMERGENCY RECONSIDERATION AND
REQUEST FOR MODIFICATION OF RULES OF YANKEE MICROWAVE, INC.**

Yankee Microwave, Inc. ("Yankee"), by its attorneys and pursuant to Section 1.429 of the FCC's rules, hereby requests emergency reconsideration of the Commission's rules implementing the retransmission consent provisions of the Cable Television Consumer Protection and Competition Act of 1992 (the "Act").¹ Specifically, Yankee challenges the language of the "superstation exemption" to the retransmission consent rules which exempts from retransmission consent superstation signals obtained from a satellite carrier, but not from other distributors such as microwave carriers.² Because the FCC's preferential treatment of satellite carriers is already adversely affecting microwave carriers, and because the eventual impact is likely to be devastating and irreversible, it is imperative the FCC act

¹ Simultaneously herewith, Yankee is filing a "Request For Stay" of the "superstation exemption" provision of the Commission's retransmission consent rules.

² The language of the "superstation exemption" was addressed by at least one party in comments filed in this proceeding. See infra n. 8. Events described herein concerning damage to Yankee's business have occurred within the past month, after adoption of the FCC's Report and Order.

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immediately to modify its rules to treat satellite and other carriers equally.

I. Introduction

Yankee is a small, FCC-licensed common carrier that delivers video programming to cable television systems in Maine, New Hampshire, Vermont, and Massachusetts. Cable systems served by Yankee provide programming to over 200,000 homes with an average of approximately 3 viewers per home. Many of the cable systems served by Yankee are in the northern New England region that has been especially hard hit by the economic recession.

For more than twenty-five years, Yankee has been distributing the signal of WSBK-TV, Channel 38, Boston, Massachusetts, as well as several French Canadian foreign language signals, via point-to-point microwave to cable systems unable to receive these signals off-air due to distance or terrain obstructions. For the past four or five years, WSBK-TV has also been distributed via satellite, but the satellite signal is not available in all regions of northern New England, again due to terrain obstructions, and the satellite signal quality is often significantly inferior to microwave.

The FCC's proposed retransmission consent rules are threatening the continued viability of Yankee's small microwave business, as well as that of other microwave carriers and alternate video distribution systems which compete with satellite carriers. Specifically, a single provision in those rules is forcing Yankee's cable system customers to cancel microwave service in favor of delivery of programming via satellite.

The FCC's rules require a cable system to obtain "retransmission consent" from distant television broadcast stations whose signals are carried by the cable system. An exception to this provision was established for "superstations," however. Pursuant to Section 76.64(b)(2) of the FCC's rules, retransmission consent does not apply where "the multichannel video programming distributor obtains the signal from a satellite carrier and the originating station was a superstation on May 1, 1991." 47 C.F.R. § 76.64(b)(2) (emphasis added).

As this exception is written, it covers only superstation signals obtained from a satellite carrier, not from alternate distribution systems such as microwave provided by small common carriers such as Yankee or cable TV-owned CARS systems. As a result, cable systems that receive superstation programming from Yankee's small microwave network are required to obtain retransmission consent, while those systems that switch to satellite delivery of the very same superstations are exempt from the retransmission consent requirement!

II. Argument

A. There Is No Rational Basis For Disparate Treatment Of Microwave And Satellite Carriers.

There is no legitimate rationale for the FCC's preferential treatment of satellite carriers over such alternate video services such as microwave.³ Satellite carriers are not in economic

³ Yankee is not challenging the superstation exemption itself, nor the requirement that the originating station have been a superstation on May 1, 1991. Yankee simply believes the exemption should apply to all current means of delivery of the superstation

distress, nor do they face unfair competition from other service providers. To the contrary, satellite services continue to demonstrate strong growth potential in the communications industry. In contrast, microwave carriage has been in severe decline due to increased competition from satellite, fiber optic cable, and other alternate video delivery systems. Moreover, to add new channels or paths of service, microwave carriers are required to obtain prior FCC approval. This inherent delay has proven to be a significant disadvantage for microwave in its efforts to compete with satellite and fiber optic providers. The FCC has recognized this problem, and recently moved to address it by proposing to permit microwave carriers to commence construction of new facilities prior to receiving FCC authorization. See Notice of Proposed Rulemaking, CC Docket No. 93-2 (FCC 93-5) (released February 9, 1993).

The FCC's disparate treatment of microwave and satellite carriers is already affecting Yankee's business and will adversely affect cable subscribers. Several cable systems have notified Yankee they intend to cancel microwave service and switch to satellite delivery of superstations. Even though satellite delivery is more expensive than microwave, requires cable systems to invest in additional equipment, and often provides poorer signal quality than microwave, these cable systems are being forced to abandon Yankee's microwave network to avoid the necessity of negotiating

signal, satellite or otherwise.

for retransmission consent and possibly paying significant fees.⁴

Furthermore, cable systems carrying microwave-fed channels are prohibited from passing the cost of retransmission on to their subscribers. Cable systems receiving the same signals via satellite, however, may chose to offer the signal in a separate service tier and pass on to subscribers the higher cost of satellite versus microwave delivery. At least one cable multisystem operator has already indicated it will switch from microwave to satellite delivery and raise its price to cover the costs for satellite-fed signals. This is certainly an anomalous result from legislation designed to promote competition and prevent otherwise unnecessary rate increases!

B. There Is No Evidence In The Legislative History Of
The 1992 Cable Act That Congress Intended To Provide
Preferential Treatment For Satellite Carriers.

Congress' intention in adopting the superstation exemption was to avoid disrupting established carriage relationships of superstation signals.⁵ The purpose was to exclude from retransmission rights all signals which were superstations as of

⁴ Attached hereto is an article from the April 26, 1993 edition of Broadcasting and Cable magazine demonstrating the significant retransmission fees currently being contemplated by station owners. Cable operators have reported many stations indicating they will request fees comparable to the highest individual cable-delivered, non-premium channels (e.g., ESPN - \$1.80/subscriber/month).

⁵ See Senate Report No. 102-92, 102d Cong., 1st Sess. at 37 (June 28, 1991) (hereinafter "Senate Report"). The Senate version of the Act exempted "users of broadcast signals that were transmitted by satellite carrier or common carrier on May 1, 1991." The intent was to exclude from retransmission rights "stations which now operate as 'superstations' or whose signals are delivered to home satellite dishes..." Id.

May 1, 1991.⁶ There is no indication from the legislative history
of an intention to differentiate between such signals currently

carriers is arbitrary and capricious and a violation of due process and equal protection. As indicated above, there is no rational basis to prefer satellite carriers over alternative video distributors. Nor did the Commission even attempt to define the purpose of its discriminatory rule.⁸ Such arbitrary and unfairly discriminatory action is unconstitutional.

D. The FCC's Rules Should Be Modified To Delete The Reference In The Superstation Exemption To Signals Obtained From A Satellite Carrier.

In light of the foregoing, Yankee respectfully submits that Section 76.64(b)(2) of the Commission's rules should be modified to delete the reference to signals obtained from a satellite carrier. With this change, the rule would accurately reflect Congress' intent to cover all signals of stations qualifying as a superstation on May 1, 1991.

The proposed revised superstation exemption rule would read as follows:

⁸ At least one party contested the Commission's tentative conclusion in its Notice of Proposed Rulemaking that superstation signals delivered via terrestrial means such as microwave remain subject to retransmission consent. See Comments of Newhouse Broadcasting at 17 - 19. The Commission responded to this comment by stating only "our conclusion is supported by the plain language of the statute." Report and Order, MM Docket 92-259, released March 29, 1993, at 80 - 81. As noted above, however, there is no evidence in the legislative history that supports Commission's statutory interpretation. To the contrary, the legislative history clearly implies the exemption was intended to grandfather certain signals regardless of their current means of delivery. Moreover, in other instances the Commission found latitude in the language of the Act to permit interpretation of legislative intent. For example, the

Section 76.64 Retransmission consent.

...
(b) A commercial broadcast station may be retransmitted without express authority of the originating station if

...
(2) The originating station was a superstation on May 1, 1991; or

...

Swift action from the FCC to modify its discriminatory rule is necessary to prevent further damage to microwave carriers. As noted above, cable systems are already being forced to abandon microwave delivery of signals, and are unlikely to return to the Yankee microwave network once they have invested in the necessary equipment for satellite reception.

WHEREFORE, for the reasons set forth above, Yankee respectfully requests that the Commission reconsider the language of the superstation exemption to its retransmission consent rules, and modify that exemption to treat satellite and other carriers of superstation signals equally.

Respectfully submitted,

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Top of the Week

NAB has high hand in Vegas

National Association of Broadcasters President Eddie Fritts told his membership he is "more optimistic about being in broadcasting than ever before," kicking off the NAB's annual convention in Las Vegas last week that drew a record 64,500 attendees, 22% more than in 1992.

And there were surely reasons for such optimism. For the first time, retransmission consent looked as if it may actually generate some extra revenues (see below). Plus, new technologies such as digital audio broadcasting, radio broadcast data system and high-speed data broadcasting promised new opportunities, although many were uncertain about broadcasters' role in multimedia (see page 19).

Fritts might also have expressed enthusiasm about the trade show business. NAB's projected net

